1967

Jaeger And Branch, Inc., A Corporation v. Jim Pappas dba Jim Pappas Construction Company : Brief of Respondent

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CASES

STATUTES

IN THE SUPREME COURT

OF THE STATE OF UTAH

JAEGER AND BRANCH, INC. a corporation,

Plaintiff-Respondent

vs.

Case No. 10885

JIM PAPPAS dba JIM PAPPAS CONSTRUCTION COMPANY,

Defendant-Appellant

Appeal from a Judgment against the Defendant Granted by the Third District Court in and for Salt Lake County, Honorable Leonard W. Elton, Judge, Presiding.

STATEMENT OF THE KIND OF CASE

Respondent, taking the position of a holder in due course of a check in the face amount of $6,500.00 has brought suit against the maker of the check, the maker asserting the claim that because of certain conversations between the maker and the holder, prior to writing of the check, placed the duty upon the holder to investigate the circumstances giving rise to

the check before accepting the same.

DISPOSITION OF THE LOWER COURT

The parties having stipulated in chambers that the respondent, by introducing the check sued upon into evidence, had presented a prima facie case, that respondent was the holder in due course, and the appellant then having presented his evidence, and the respondent then having moved the Court for judgment in its favor on the grounds that the Appellant did not present a defense, the Court granted judgment in respondent's favor for the sum of $6,500.00, with interest thereon at the rate of 6% per annum from January 18, 1966, plus costs.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the District Court.

STATEMENT OF FACTS

Respondent does not agree with appellant's statement of facts. It is to be noted at this point that respondent had introduced no testimony other than the 2 pages of testimony of W. W. KIMBALL, TR 21, 22 and 23. The testimony upon which the lower Court made is decision was that of appellant's and not respondent's. However, that testimony, far from being undisputed, was weighed and accepted and

rejected by the trial Court by the standards of its consistency and ultimately, its credibility.

Respondent disagrees with the following statements of fact made by appellant:

1. On page 3 of appellant's brief, there is no indication that the two deliveries referred to therein were to be the last deliveries (TR 51, L 13-14).

2. Again on page 3 of appellant's brief, the check was not forwarded as a payment for the goods to be received,but for working capital (TR74, lines 2 through 6).

3. Again on page 3, respondent disagrees with appellant's statement. The evidence shows appellant had told ALLO that payment on the check would be stopped only after the check had been delivered to ALLO by appellant, and only after, it had been in turn negotiated by ALLO to respondent. It is to be noted that on TR 51, lines 6 and 7, appellant testified that "I have sent you a company check"; yet, at the time of that conversation, the check had not been written. Appellant clarifies this language later on, on TR 51, lines 18 through 20, when he states that it was Monday morning, January 11, 1966 when he said, "if that truck is not

here Tuesday morning, I am going to stop payment on the check".

4. The telephone calls alluded to on page 3 of appellant's brief did not take place on January 12, but took place on January 11, 1966 (TR 55), before the check was written.

5. On page 4 of appellant's brief, there was no testimony whatsoever that ALLO DISTRIBUTING "agreed to ship an additional truckload of merchandise". The only testimony on TR 43, lines 24 to 27, was that "there was the 13 rolls of carpeting yet to be received...".

6. Again, on page 5 of Appellant's brief, respondent clearly told appellant that respondent was owed money by ALLO (TR 80, lines 25,26 and 27).

7. On page 9 of appellant's brief, appellant states that the "final shipment was not received". There is no evidence as to what the final shipment was; therefore, obviously no evidence as to whether or not it was received.(TR 51, lines 13 and 14)

STATEMENT OF FACTS

Inasmuch as neither appellant nor respondent has designated the exhibits on this appeal, neither the parties may rely upon them, but must confine their arguments to the transcript and the record on

appeal before this Honorable Court.

This statement of facts which will follow, will be presented in chronological order.

Prior to January 12, 1966, ALLO DISTRIBUTING, who is not a party to this litigation, had, pursuant to some agreements which are not before this Court, been selling merchandise to the appellant (TR 29, lines 5 through 7). There is no evidence before this Court as to what the nature of the relationship was between ALLO and appellant, other than supplier and purchaser, nor what the terms of the purported agreements between ALLO and appellant were.

There was never any agreements between respondent and appellant (TR 59, line 27).

On January 11, 1966, and before the subject check was written, the appellant and his "interior decorator", who held no official position with defendant (TR 25, lines 27 and 28; TR 62, lines 28 through 30; TR 63, lines 1 through 11; TR 35, lines 24 through 30; TR 36, lines 1 through 4), and whose duties and authority as an interior decorator were unclear and uncertain, had four conversations with respondent's agent, DON MORELAND. It is to be noted that all of these conversations with appellant

took place before the check was written on January 12, 12, 1966 (TR 49; TR 53, line 11; TR 55, lines 5 through 8; TR 61, line 30; TR 63, line 30; TR 64, lines 1 through 2; TR 77, lines 4 and 5; TR 82, lines 25 through 29).

The purpose of the conversations with respondent was to determine (1) if JAEGER & BRANCH had been paid, and (2) if respondent was holding up the shipment of carpeting (TR 49, lines 3 through 11). It is uncertain whether or not appellant succeeded in having his inquiries answered. On page TR 49, lines 26 through 30, appellant testified that MORELAND couldn't tell him what the status of the relationship or the accounts were between respondent and ALLO, that possibly, on TR 50, line 5, MORELAND was either "real happy with the deal" or "had been paid in full" or that the interior decorator had been told by MORELAND prior to January 12, 1966, that money was still owed (TR 80, lines 25 through 27).

It is critical to note what was <u>not</u> said during these four conversations between appellant and respondent; namely, there was no mention of the check, and obviously then neither was there any mention of the maker, the payee, the amount, the drawer

or the date of the check, nor was there any mention of any conditions of delivery of said check, nor the consideration for the check. At the time of these conversations, the check had not yet been written. The check was written on January 12, 1966 (Pre-Trial Order TR 6).

On January 12, 1966, after the conversations with respondent, appellant executed the subject check (Pre-Trial Order TR 6).

There is nothing in the record to indicate that the check was not regular or unconditional on its face (TR 69).

There is nothing in the record to indicate that the check was delivered to the payee, ALLO, with a cover letter or written memoranda implying conditions upon the delivery (TR 69, lines 13 and 14). As a matter of fact, Appellant did not tell the payee either in writing or by word of mouth what to do with the check (TR 75, lines 27 through 30). Question: "Did you tell them what he should or should not do with the check?" Answer: "No. I imagine he (ALLO) was going to cash it." Question: " You didn't tell him not to cash it?" Answer: "I should say not." Question: "You didn't tell him not

to negotiate it?" Answer: "No."

It is obvious that the trial Court chose to disbelieve appellant's claim made in paragraph 3 of its Answer (TR 3) which reads: " And the delivery of the check was conditioned upon shipment of additional items of equipment and furniture forthwith by ALLO DISTRIBUTING COMPANY, which ALLO failed to do." The trial Court in choosing to disbelieve appellant's claim relied in part on the foregoing and the following testimony: Question: "And you told them that the reason you were sending the check for $6,000.00 is for them to get the carpet released?" Answer: "The reason I told them that I was going to send them the $6,000.00 is that they had to pay all of their bills, everything had been paid for, and that they needed some operating capital and it would help very much if they had $6,000.00." (TR 75, lines 29-50, TR 76, lines 1-6).

The strongest language upon which appellant can rely is the appellant's testimony of purported conversation with ALLO in which appellant attempts to establish a conditional delivery. "I told them I would send him the check on those conditions". What appellant never testified is what those condi-

tions were. Instead appellant testified on (TR 75, lines 27-30) that appellant didn't tell the payee, ALLO, not to cash the check, or what to do with the check, but presumed that ALLO would cash the check.

Pursuant to stipulation (TR 21, lines 6-9) made in Chambers at the time of trial (TR 12), and the Pre-Trial Order (TR 6), it was stipulated that the check was delivered to respondent by ALLO on January 14, 1966, and that respondent's, prima facie took the check as a holder in due course.

The carpeting was released on the very same day that the check was negotiated to respondent, on January 14, 1966 (TR 60, lines 10-14 and lines 20 and 21).

There is no testimony of any communications, either by word of mouth or written communications, between appellant and respondent during the period of time after the check was written on January 12, 1966.

Payment was stopped on the check January 18, 1966 (TR 22, line 9).

ARGUMENT

Point 1: The evidence is to be construed in favor of respondent.

Appellant's assertion that the evidence is

to be construed in favor of the appellant on the force of an analogy of the case at bar with that of a Summary Judgment, is to fly in the face of logic. In a Summary Judgment context, the trial Court never had an opportunity to hear the testimony or to weigh the credibility of the witnesses, and for that reason every indulgence in the favor of the non-prevailing parties is made. In the case at bar, however, the trial Court did have an opportunity to hear appellant's witness and to examine appellant's evidence. The trial Judge, who was the trier of fact, did have the opportunity to weigh the credibility of the appellant's claims, to hear the witness' voice, and to examine the witness' demeanor. It is respectfully submitted that this Court cannot substitute its judgment for that of the trial Court with respect to the weighing of the evidence. As stated in MC COLLUM vs. CLOTHIER 121 U.311, 241 P 2d 468, the plaintiff having prevailed, is entitled to the benefit of the evidence viewed in the light most favorable to him, together with every inference and intendment fairly and reasonably arising thereform.

Point 2: Appellant having stipulated in the trial Court that plaintiff was a holder in due cours

and had made out its case prima facie, cannot invoke the provisions of 70A-3-307 UCA, 1953.

Counsel stipulated in Chambers, as is supported by the record (12; TR 21, lines 1 - 9; TR 24, lines 27 and 28) that it was to be presumed that plaintiff was a holder in due course and had made its prima facie case by introducing the check into evidence. It was agreed at the Court's suggestion and by counsel that to conserve the Court's time, appellant would proceed to rebut respondent's prima facie case as a holder in due course.

Appellant now attempts to invoke the benefit of 70A-3-307 UCA, 1953, and to place the burden of proof on respondent, in violation of the stipulation made before the trial court. The only explanation that respondent can find for this argument made by appellant, is that the author of the brief, Mr. M. BYRON FISHER was not the trial counsel and was not present in Court.

An examination of the transcript reveals that the trial counsel for appellant, MR. BIRD, understood the stipulation, and conducted himself pursuant to that stipulation. The Court's attention is respectfully directed to (TR 32, L.30 and TR 33, L. 1-8) which indicates that during our colloquy , the

question was raised as to the relevancy of acts occurring after the negotiation and endorsement of the check by the payee to respondent. Appellant and respondent and the Court were proceeding, pursuant to the beforesaid Stipulation, in essence, that unless appellant succeeded in rebutting the presumption that respondent was a holder in due course, any evidence of acts occurring after the delivery of the check were irrelevant, as the defense that those later acts would establish would be cut off by the negotiation of the check to the holder in due course. That is why (on TR 32 and TR 33) when respondent's counsel objected to a question which sought information after the check was negotiated: "The check was negotiated on January 14; anything happening after January 14 would be irrelevant for the purposes of this trial." Counsel for appellant answered: "I grant that to be true." Counsel was merely, by their Stipulation, following the law enunciated in the case of Mann vs. Andrus, 169 Cal Ap 2d 455, 337 P. 2d 473, 476, in which the Court stated: "The acquisition by the plaintiff of the information concerning the infirmities, if any, in the instrument after the time of purchase, does not affect his status as a holder in due course."

Appellant had the burden of proof to rebut

the prima facie showing that respondent was a holder in due course. The trial court held that appellant did not sustain this burden of proof.

Appellant introduced no evidence to the effect that respondent did not give value for the check.

Appellant introduced no evidence that the check was irregular on its face.

Appellant introduced no evidence that respondent had any notice of any infirmity in the check.

Appellant's only contention, both at the trial and on this appeal, is that respondent had a duty to investigate and to inquire, and that respondent failed to comply with that duty.

RESPONDENT WAS UNDER NO DUTY OR OBLIGATION TO INVESTIGATE THE CIRCUMSTANCES GIVING RISE TO THE EXECUTION OF THE CHECK

Appellant has attempted to set forth the proposition that because of the four telephone calls between appellant and respondent prior to the execution of the check, respondent was placed under an obligation to investigate the circumstances giving rise to the execution of the check. Appellant's position is without merit.

An analysis of the four telephone conversations reveals the following:

1. The phone calls were initiated by appellant.

2. Respondent was reluctant to divulge its business relationship with its customer, ALLO, for fear of breaching its business ethics.

3. That after appellant's tenacious interrogation, respondent finally told appellant that respondent was owed money by its customer ALLO.

4. Appellant admitted to respondent that appellant was not having difficulty with ALLO, but that appellant "just wanted to be sure that they [ALLO] weren't maintaining their end of the contract" (TR 79, lines 11 - 17).

5. Neither appellant nor his employee, Miss Voorhees, ever mentioned the check to respondent, since it had not been written. (TR 82, lines 25 - 30).

6. The testimony of appellant, although conflicting, gives rise to the inference that at the time of the telephone conversations with respondent, on January 11, 1966, before the check was written, appellant had not consummated whatever agreement he had made with ALLO concerning the check. Appellant testified (TR 63, line 30; TR 64, lines 1 and 2): "At the time when Miss Voorhees called Donald

Moreland, there was no checks wrote. There was no amount settled on." And again on (TR 59, lines 7 - 9): "Did you tell Don Moreland the amount of the checks you were about to pay ALLO DISTRIBUTING COMPANY? Answer: No, sir. There was no amounts set at that time."

It is respectfully submitted that the trial Judge correctly concluded that at the time of the conversations between appellant and respondent, appellant had not yet made his "deal" with the payee ALLO. At the very least, the inference is present that if appellant had made its deal with the payee ALLO, it did not communicate this fact to respondent.

After those phone conversations, when respondent received the check, on January 14, 1966, and observed that the check was regular on its face, and observed that the check was written the day after the phone calls, January 12, 1966, there is no reaso in the world why respondent, acting as a reasonable man, should question the propriety of the check in the payee ALLO'S hands. The reasonable inference, it is submitted, is that after the phone calls on January 11, between appellant and respondent, appellant decided to pay ALLO.

The entire rationale underlying the concept of negotiability would be frustrated, and commerce would be halted, if a prospective holder of a negotiable instrument was forced to make an investigation each time the instrument was negotiated to him. Szczotka vs. Idelson, 39 Cal Reporter 466 (California) on page 471, holds: "The decisions hold that a purchaser of negotiable paper before maturity need not make inquiry of the makers with respect to the consideration therefor and the circumstances leading up to the execution. (Witty vs. Clinch, 207 Cal 798, 279 P. 799)"

The cases cited in support of appellant's proposition that respondent had a duty in inquire, are not in point. The facts of the case of Norman vs. Worldwide Distributors, Inc., 202 Pa., super 193 A. 3d 115 (1963) is distinguishable on its facts In that case, the purported holder in due course had dealt with the defrauding payees in three different situations in which the payees had used different names; the holder in due course knew that the referral plan of the payees was closely suspect of being fraudulent; the holder in due course even called the maker of the note to disavow any knowledge of the

purported holder in due course of the fraudulent scheme; the note was purchased by the purported holder in due course for a substantial discount, a matter of days after the execution of the note. In the case at bar, the record is totally devoid of any complicity on the part of the respondent with the payee. Appellant even testified that respondent was concerned about the ethics in speaking with appellant (TR 42, line 16).

In the case cited by appellant of Potter Bank and Trust Co. vs. Massey, 11 Misc, 2d 523, 171 N.Y.S. 2d 27 (1958), the court was faced with a statute which is substantially different from 70A-3-302 (1) (b) U.C.A., in 1953, which deals with the requisites of a holder in due course. The Utah statute provides only that the holder must be one "in good faith", yet the statute before the court in the Potter case provided that the holder must be "in good faith including observance of the reasonable commercial standards of any business in which the holder may be engaged." When the State of Utah enacted the Uniform Commercial Code, it did not include the language which is underlined. The Potter court, on 11 Misc. 2d 526, states: "Plaintiff argues that

the words italicized above [the underlined language] affected no change in Pennsylvania law, and that, under prior decisions, nothing short of actual knowledge or a wilful intent to evade such knowledge will constitute lack of good faith. Whether that was the law prior to 1953 is not necessary to decide; the clear language of the statute ...". Respondent herein submits that because of the difference in the language between the statute cited in the Potter case and the statute enacted in the State of Utah, a different result must follow. Neither respondent, nor, evidently, appellant has been able to find any applicable Utah cases on this point. It is therefore respectfully submitted that the Utah statute when read with the holding of Szczocka vs. Idelson, supra, there was no duty on the part of respondent to make an investigation. Even if this Court should find that the law of Utah does impose a duty of investigation, it is respectfully submitted that the facts, as reflected by the transcript, in the case at bar, are not sufficient so as to place that duty upon this respondent. If nothing else, respondent had every right to be reassured, upon receiving a check dated after respondent's conversations with

appellant.

CONCLUSION

The trial of this suit, before the trial Judge, was conducted and tried pursuant to a Stipulation by which defendant had the burden of proof of rebutting the presumption that plaintiff was a holder in due course and entitled to judgment. After hearing defendant's(appellant's) evidence, after weighing the credibility of the evidence, after examining and rejecting the testimony and the possible inferences and presumptions arising therefrom, the trial court concluded that defendant did not establish a defense and did not rebut plaintiff's presumptive prima facie case.

In answer to appellant's claim that respondent was placed under a duty of inquiry, there is ample evidence to support Finding of Fact #2, "that plaintiff had no notice of any conditions or circumstances on or prior to the date that the check was negotiated to plaintiff, which would put plaintiff on notice of any infirmities of the check, or would likewise impose a duty of inquiry upon plaintiff." (TR 13)

It is respectfully submitted that the

language of the McCollum vs. Clothier case, supra, compels this Court to accept the Findings of Fact of the trial court, and to affirm the judgment.

Respectfully submitted,

RAY, QUINNEY & NEBEKER
and RODKIN AND BLUM

BY: _____
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